

**IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA**

**SUSAN S. DEPAOLA, Chapter 7 Trustee
for the Bankruptcy Estate of Philip L.
Goodwyn, and SIMPLE PLEASURES,
INC.,**

Plaintiffs,

v.

**V RESTAURANTS, INC., an Alabama
corporation, and VINCE SAELE, an
individual,**

Defendants.

Case Number: 06-00893-WKW-SRW

**Bankruptcy Case No. 05-32325 –
Chapter 7, Bankruptcy Adv. Pro. No.
05-03062-WRS**

**PLAINTIFFS' JURY INSTRUCTIONS AND VERDICT
FORMS**

The Plaintiffs hereby request the following 40 (Attached) instructions and jury forms be included in the Court's charge to the jury following the conclusion of the trial of this case. Plaintiffs reserve the right to supplement, alter, and withdraw the instant requested charges.

Respectfully submitted on this the 12th day of March 2007.

Memory & Day

By: /S/ James L. Day

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ASB-1256-A55J

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document on the following, by:

- ☒ placing same in the United States Mail, postage prepaid, and properly addressed
- ☐ facsimile
- ☐ hand delivery
- ☐ delivered in open court

on March 12, 2007.

Daniel G . Hamm, Esq.
560 South McDonough St.
Montgomery, Alabama 36104

/S/ James L. Day
James L. Day

PLAINTIFFS' REQUESTED JURY CHARGE NO. 1.

Plea of General Issue - Introduction

The Plaintiffs sue for the conversion of a restaurant business and the property associated with the restaurant business.

The defendants say that the Plaintiffs should not recover.

For the Plaintiffs to win, they must reasonably satisfy you that they had right and title to the restaurant business and the property used to operate the restaurant. If the Plaintiffs are successful in sustaining their burden, you may give the Plaintiffs the dollar value of the restaurant business and the property associated with the restaurant business. (Authority: Alabama Pattern Jury Instructions, hereafter "APJI", 12.01)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 2.

Breach of Contract - General Definition

A contract is an agreement between two or more persons or parties based upon a valuable consideration to do or refrain from doing a particular lawful act. (Authority: APJI 10.1)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 3.

Breach of Contract - Elements

The elements of a valid contract are:

- 1) Agreement between two or more competent parties;
- 2) lawful object;
- 3) valuable consideration;
- 4) assent of the parties in the same sense- that is a “meeting of the minds”

(Authority: APJI 10.2)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 4.

Contract

Acceptance-Definition

An acceptance of an offer occurs when the one to whom the offer is made unconditionally consents to it and agrees to be bound by all of its terms and conditions.

When one to whom an offer is made accepts it according to its terms and conditions, it becomes a binding contract between the one making the offer and the one to whom it was made, and both parties are bound by its terms and conditions (Authority: APJI 10.05)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 5.

Contract

Mutual Assent-Definition

Mutual assent means the meeting of the minds of the parties to a contract That is each agrees to all the terms and conditions, in the same sense and with the same meaning. Agreement or mutual assent is essential to a contract. (Authority: APJI 10.06)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 6.

Contract

Intent-Determination

The intent of the parties to a contract is determined by considering the relationship of the parties, what they said and what they did and all the surrounding circumstances. You will consider the nature of the contract, facts and circumstances leading up to and attending its execution, relation and condition of the parties, nature and condition of the subject matter and apparent purpose of making the contract. From a careful consideration of all of these matters you will determine from the evidence the intention of the parties at the time of the execution of the contract and render a verdict based upon the intention of the parties. You will not attempt to alter the expressed intention of the parties if they are clear and unambiguous. A person's secret intent has no bearing; only the intent indicated by his words and acts may be considered. (Authority: APJI 10.07)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 7.

Contract

Action For Breach-Elements

The plaintiff in this action sues the defendant for breach of. contract. The elements of an action for breach of contract are:

1. Existence of a contract between plaintiff and defendant.
2. Performance by the plaintiff.
3. Defendant's failure to perform.
4. Resulting damage to the plaintiff.

(Authority: APJI 10.12)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 8.

Contract

Damages-General Rule

Damages for the breach of a contract is that sum which would place the injured party in the same condition he would have occupied if the contract had not been breached. (Authority: APJI 10.17)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 9.

Contract

Interest On Damages For Breach

If you are reasonably satisfied from the evidence that the plaintiff is entitled to recover and you have arrived at the amount of your award you should then determine from the evidence the date the plaintiff was entitled to the damages arrived at by you and then add interest thereto at the rate of 6% per annum from the date you find the plaintiff was entitled to have received the damages to the present date of _____

(Authority: APJI 10.18)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 10.

Contract

Substantial Performance-Definition

Substantial performance of a contract is performance of all its important parts, but does not require a full or exact performance of every slight or unimportant detail. (Authority: APJI 10.21)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 11.

Contract

Substantial Performance-Damages

A party may recover the contract price, less the reasonable costs of remedying any trivial defects or omissions if he has substantially performed such contract. (Authority: APJI 10.22)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 12.

Conversion - General Definition

Conversion is:

1. The appropriation of the personal property of one by another to his or its own use and benefit; or....
2. The exercise of dominion by another over personal property to the exclusion or in defiance of the owner's right; or,
3. Withholding the possession of personal property of the owner by another under claim of title inconsistent with the owner's title. (Authority: APJI 39.00)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 13.

Conversion - Evidentiary Proof Required

Proper submission of a conversion count to a jury requires a plaintiff to produce evidence from which reasonable jurors could infer "a wrongful taking or a wrongful detention or interference, or an illegal assumption of ownership, or an illegal use or misuse" of PLAINTIFFS' property or rights in property. Authority: Ott v. Fox, Ala., 362 So.2d 836, 839 (1978)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 14.

Unjust Enrichment - General Definition

The essence of the theory of unjust enrichment is that the Plaintiff can prove facts showing the defendant holds property which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid because of mistake or fraud. Authority: Dickenson v. Cosmos Broadcasting Company, Inc., 782 So.2d 260, 266 (Ala. 2000)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 15.

Unjust Enrichment - Evidentiary Proof Required

To prevail on a claim of unjust enrichment, the plaintiff must show that the defendant holds property which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to the defendant because of mistake or fraud. One is unjustly enriched if his retention of a benefit would be unjust. Authority: Avis Rent A Car Systems, Inc. v. Heihnan, 876 So.2d 1111, 1122 - 1123 (Ala. 2003); Welch v. Montgomery Eye Physicians, P.C., 891 So.2d 837, 843 (Ala. 2004).

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 16.

Use and Damages for Use

If the chattel has been injured, he is entitled to compensation for such injury; and as he has been deprived of the use and service of the chattel, his damages should be commensurate with the value of the use or service, otherwise this action would be inadequate or incapable of doing complete justice. The hire or value of the service of the chattel must, in such cases, be one of the criteria by which the damages are to be ascertained. Authority: Ewing v. Blount, 20 Ala. 694, 1852 WL 397, Ala., June Term 1852.

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 17.

Fraud

Introduction

Ladies and Gentlemen of the jury, the plaintiff in this case is claiming damages from the defendant (s) for an alleged legal fraud practiced upon (him) (her) by the defendant(s). The . fraud charged in the PLAINTIFFS' complaint is [here refer to the charge(s) in the complaint].

The defendant(s) for answer to the complaint say(s) (he) (they) (it) (is) (are) not guilty of the charge contained therein. (Authority: APJI 18.00)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 18.

Fraud

Willful Misrepresentation

If you are reasonably satisfied from the evidence that defendant willfully misrepresented a material fact to the plaintiff with the intent to induce plaintiff to act thereon and plaintiff did, without knowledge of its falsity, act upon said willful misrepresentation to his injury, then defendant is guilty of legal fraud. (Authority: APJI 18.01)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 19.

Fraud

Reckless Misrepresentation

If you are reasonably satisfied from the evidence that the defendant misrepresented a material fact recklessly without knowledge of the truth or falsity thereof and with the intent to induce plaintiff to act and that plaintiff acted upon said reckless misrepresentation to his injury, then defendant is guilty of legal fraud.(Authority: APJI 18.02)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 20.

Fraud

Mistaken Misrepresentation

If you are reasonably satisfied from the evidence that the defendant innocently or by mistake misrepresented a material fact to the plaintiff, thereby inducing action by the plaintiff to his injury then the defendant would be guilty of legal fraud. (Authority: APJI 18.03)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 21.

Negligence

Definition

Negligence is the failure to discharge or perform a legal duty owed to the other party. (Authority: APJI 28.00)

Given ☐

Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 22.

Negligence

Negligence And Ordinary Care

Negligence means the failure to exercise (reasonable) (ordinary) care; that is, such care as a reasonably prudent person would have exercised under the same or similar circumstances.

Therefore, "negligence" is the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or, the doing of something which a reasonably prudent person would not have done under the same or similar circumstances.

(Authority: APJI 28.01)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 23.

Negligence

Duty Owed-Negligence And Ordinary Care

The duty owed by the defendant to the plaintiff was to exercise reasonable care not to injure or damage the plaintiff; that is, to exercise such care as a reasonably prudent person would have exercised under the same or similar circumstances. (Authority: APJI 28.02)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 24.

Negligence

Findings-One Plaintiff, One Defendant

If you are reasonably satisfied from the evidence that the defendant was negligent and that the defendant's negligence proximately caused the alleged (injury) (damage), then your verdict must be for the plaintiff; however, if you find that the defendant was not negligent or if you find that the defendant's negligence was not the proximate cause of the PLAINTIFFS' (injury) (damage), then your verdict must be for the defendant. (Authority: APJI 28.03)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 25.

Wantonness- Definition

Wantonness is the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty an injury will likely or probably result. Before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he either consciously and intentionally did some wrongful act or consciously omitted some known duty which produced the injury. (Authority: APJI 29.00)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 26.

Willfulness- Definition

"Willfully means intentionally, knowingly, and purposefully". Therefore, willfulness is the conscious doing of some act or omission of some duty under knowledge of existing conditions coupled with a design or purpose to inflict injury. (Authority: APJI 29.03)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 27.

Civil Conspiracy - General Definition

A civil conspiracy is a combination of two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose not in itself unlawful by unlawful means.

The essence of the action in civil conspiracy is the wrong committed rather than the conspiracy itself. (Authority: APJI 43.00)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 28.

Civil Conspiracy - Evidentiary Proof Required

Because of the clandestine nature of a conspiracy, proof that a conspiracy existed may be proved by inference and circumstantial evidence confirming the character of the acts done, the relation of the parties, and other facts and circumstances suggestive of a concerted action.

(Authority: APJI 43.01)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 29.

Civil Conspiracy - Profit of Each Defendant Need Not Be Shown

Any defendant who participates in a civil conspiracy is liable for the damages sustained by the plaintiff as a result of the conspiracy, regardless of whether the defendant profited from the conspiracy. (Authority: APJI 43.02)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 30.

Damages

Introduction

Ladies and Gentlemen of the jury, the Court will now instruct you on the law of damages. The burden is on the Plaintiffs to reasonably satisfy you from the evidence of the truthfulness of its claim. If after a consideration of all the evidence in this case, you are not reasonably satisfied of the truthfulness of Plaintiffs' claim, your verdict should be for the Defendant(s). In this event you would go no further. This would end your deliberations. On the other hand, if after a consideration of all the evidence in the case you are reasonably satisfied of the truthfulness of the Plaintiffs' claim, your verdict should be for the plaintiff. In this event it will be necessary for you to arrive at an amount to be awarded in the verdict from which I will read to you and describe later in my charge. I now give you the following rules of law to assist you in your deliberations if you find for the Plaintiff. The Plaintiffs make two statements of claim. One statement is for compensatory damages and the other is for punitive damages. (Authority: APJI 11.00)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 31.

Damages

General

Compensatory or actual damages are allowed and should be awarded where the plaintiff reasonably satisfies the jury from the evidence that plaintiff has been injured or damaged as the result of an act on the part of the defendant.

Punitive or exemplary damages are allowed to the plaintiff and may be awarded in the sound discretion of the jury in cases where the plaintiff proves by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. (Authority: APJI 11.01, modified)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 32.

Compensatory

The purpose of awarding compensatory damages is to fairly and reasonably compensate the injured party for the loss or injury sustained. Compensatory damages are intended as money compensation to the party wronged, to compensate it for its injury and other damages which have been inflicted upon it as a proximate result of the wrong complained of. (Authority: APJI 11.02)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 33.

Other Than Personal Injury - Elements

The plaintiffs claim compensation for the following items or elements of damages:

1. That the Defendants failed or refused to pay the \$90,000.00 contract price.
2. The Defendants retained possession and use of the Plaintiffs' restaurant and the property associated with the restaurant to include a customer base, experienced and trained staff, good will, recipes, signage, telephone number, licenses and permits, and direct assistance with the transition of all existing employees to the new owners.
3. Tables, booths, chairs, stools, salad bar, steaming tables, a buffet, bar, serving pieces, dishes, glassware, silverware, leasehold improvements, cash registers, and other amenities associated with the restaurant area.
4. Refrigerators, freezers, coolers, storage bins, stoves, deep fryers, food preparation tables and bars, pots, pans, utensils, serving pieces, dishes, silverware, small appliances, sink, dishwasher, exhaust fan, extinguishing system, and other items associated with food preparation.
5. Office equipment, computers, calculators, desk, filing cabinet, copier, facsimile, time clock, and telephones.
6. Food items, spices and condiments, liquor, mixers, soft drink equipment, and other beverage machines and items.
7. Non perishable items such as paper towels, napkins, toilet paper, soaps detergents, and cleaners.

(Authority: APJI 11.12, modified)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 34.

Measure of Compensatory Damages for Conversion

The measure of compensatory damages for the conversion of personal property is the value of the property as of the date of the conversion; or the value of the property at any time between the date of the conversion and the trial, whichever is greater, with interest at the rate of six per cent (6%) per annum from the date of the conversion.

If you are reasonably satisfied that the plaintiff has proven the defendant converted the plaintiffs property, the plaintiff will further have to prove to your reasonable satisfaction the amount of compensatory damages. (Authority: APJI 39.01)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 35.

Contract Damages – General Rule

Damages for breach of a contract is that sum which would place the injured party in the same condition he would have occupied if the contract had not been breached. (Authority: APJI 10.17)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 36.

Damages - Punitive

Punitive damages are allowed to the plaintiff and may be awarded in the sound discretion of the jury in cases where the plaintiff proves by clear and convincing evidence that the defendant consciously or deliberately engaged in legal malice, willfulness, insult, or other aggravating circumstances, or where conversion is done in known violation of the PLAINTIFFS' right.

Clear and convincing evidence is evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and the high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than the preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

(Authority: APJI 39.02)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 37.

Speculative

In awarding damages in any case your verdict must not be based on mere speculation or conjecture but must be based upon the evidence and the just and reasonable inferences shown thereby. (Authority: APJI 11.22)

Given ☐

Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 38.

Assessment of Alternate

Value on Verdict for Plaintiff

Suit for Articles In Possession Of Defendants

First, you must decide if the Plaintiffs have reasonably satisfied you that they have the right to the property in this action. If the Plaintiffs prove this, you should set the dollar value of the restaurant and the property associated with the restaurant if the Plaintiffs cannot get these items back. (Authority: APJI 12.02)

Given

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Refused

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PLAINTIFFS' REQUESTED JURY CHARGE NO. 39.

Introduction - Forms of Verdict

Ladies and gentlemen of the Jury, for your convenience, the court has prepared for your use in this case forms of verdict which will be explained to you. No inferences are to be drawn by you from the fact that the court has supplied you with these forms, or from the order in which the court reads them to you. When you have reached a verdict you will select and complete the form which corresponds to your verdict and which is to be signed by your foreman. All twelve of you must agree on any verdict which you return to the court. (Authority: APJI 37.00)

Given ☐ Refused ☐

PLAINTIFFS' REQUESTED JURY CHARGE NO. 40.

Multiple Defendants, Multiple Claims, Indivisible Damages

A. PLAINTIFFS' Verdict

If, after a full and fair consideration of all the evidence, you find for Plaintiffs on some or all of the claims, then you should use the following verdict form:

Claim 1: Breach of Contract.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 2: Conversion.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 3: Unjust Enrichment.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 4: Damages for Use.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following

defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 5: Fraud.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following

defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 6: Negligence.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following

defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 7: Wantonness.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following

defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 8: Willfulness.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following

defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

Claim 9: Conspiracy.

"We, the jury, find in favor of the Plaintiffs on this claim and against the following defendants: circle the name of each defendant against whom you find:

1. V Restaurants
2. Vince Saele

"We, the jury, having found in favor of the Plaintiffs on one or more of the above claim(s) assess Plaintiffs compensatory damages at _____ dollars (\$_____).

"We, the jury, having found in favor of Plaintiffs on claim(s) numbered _____ assess Plaintiffs' punitive damages at _____ dollars (\$_____).

Foreperson"

A. Defendants' Verdict

If, after full and fair consideration of all the evidence you find for the Defendants on all claims, then you should use the following verdict form:

"We, the jury, find in favor of the defendant and against the plaintiff on all claims.

Foreperson"

(Authority: APJI 37.05(B))

Given ☐ Refused ☐